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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 300

JAMES CHARLES POLLOCK,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, James Charles Pollock, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on May 31, 1967.

Citations to Opinions Below

The Court of Appeals for the Second Circuit affirmed the judgment herein without opinion on May 31, 1967. The judgment of the Court of Appeals is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1967. The jurisdiction of this Court is invoked under Title 28 of the United States Code, §1254(1).

Question Presented

Should a judgment of conviction in a Federal criminal case be permitted to stand where, in flagrant violation of the Court's explicit instruction not to consider the question of punishment, the jury incorporates in its guilty verdict a recommendation for leniency?

Statute Involved

Section 1343 of Title 18 of the United States Code provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879 § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

Statement

The petitioner, James Charles Pollock, was convicted in the United States District Court for the Eastern District of New York on the 10th day of February, 1967, and sentenced to three years imprisonment in the custody of the Attorney General.

The indictment charged that on the 11th day of September, 1962, the defendant, using the names Al Martin and William Anderson, telephoned from Washington D.C. to Garden City, New York, and fraudulently represented to one Pamela LeBoutillier that her son, Timothy Secor, owed him $750 as a gambling debt and was under his control and that Secor would be produced upon the payment of the $750.

The offense charged in the indictment occurred in September of 1962 and the indictment was filed in November of 1962. In February of 1963 the defendant entered a plea of guilty before Judge Mishler and on March 7th was sentenced under the provisions of §§4209 and 5010(b) of Title 18, U.S.C. After the defendant had served 480 days on that sentence, a petition under §2255 of Title 28 U.S.C. to vacate the plea was granted, and on July 1, 1964, the plea was set aside and the defendant readmitted to bail. The basis on which the plea was set aside was that the defendant had not been advised that he might be kept in custody longer under the provisions of law pursuant to which he was sentenced than the five year statutory maximum directly provided for the offense (Docket Entries, A. 1-2).* See: *United States* v. *Pilkington*, 315 F. 2d 204 (4th Cir. 1963).

The retrial in this case was a relatively brief one and took but two days. The summation of counsel and the charge of the Court and the jury's deliberation consumed a third day. The Government's proof in its essentials was that Mrs. LeBoutillier had received a telephone call from someone in Washington claiming to be Al Martin who asserted that her son, Timothy Secor, owed him a gambling debt and that

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* Numbers following the letter A refer to pages of the Appellant's Appendix.

Secor was under his control and would be produced near the LeBoutillier home when the $750 had been wired to Washington. Negotiations spread over several hours and finally Mrs. LeBoutillier wired the $750 to Washington, D.C. in the predesignated name of William Anderson where the money order was cashed by a Western Union clerk. Mrs. LeBoutillier delayed notifying the authorities for some time.

A Western Union clerk from Washington was produced to testify that he had cashed the money order and paid it to the defendant, and though taxed with various inconsistencies in description in pre-trial statements, remained firm in his testimony that Pollock was the man who had cashed the money order sent to Washington by Mrs. LeBoutillier.

Secor testified that after he had abruptly left the University of Miami, where he had had trouble with the University authorities because of a phony telegram of excuse that he had sent to them, and gone to New Orleans where he worked as an encyclopedia salesman, he had met and in fact briefly roomed with the defendant Pollock, who was similarly employed, and that he did not owe Pollock $750. There was other proof adduced as to an identifying number given to Mrs. LeBoutillier being similar to, though not the same as Pollock's Marine Corps serial number. The defendant Pollock offered no evidence.

At 11:20 A.M., after a charge to which neither side took any exception and during which the Court explicitly instructed the jury not to consider the question of punishment, the jury retired. At 12:10 the jury returned with a request for the reading of some of Secor's testimony. After lunch the jury returned with a request as to the availability

of handwriting comparison evidence. The Court, with the agreement of both counsel, simply charged them that no such evidence was available. At this point the jury requested the reading of the Western Union clerk's testimony. The jury retired again at 3:20 and returned again at 4:10, finding the defendant guilty and conveying the remarkable request through the foreman that leniency be extended to the defendant.

The Court in its charge to the jury had instructed them:

> "The matter of punishment of the defendant or the extent or amount of it in the event that you find the defendant guilty, *must not enter into your deliberations.* That is a matter left solely to the Court and not to the jury." (Emphasis supplied. A. 19).

The jury, obviously having set the Court's charge at naught, reported its verdict as follows:

> "The Court: Mr. Foreman, I have your written message that the jury has reached a unanimous verdict.
>
> How do you find?
>
> The Foreman: The jury finds the defendant guilty as charged.
>
> The jury has requested that the Foreman report to you that leniency be extended to the defendant." (A. 25)

In this petition we argue that this flagrant violation of the Judge's instruction not to discuss punishment had the same obvious prejudicial effect on the jury's deliberations as an erroneous instruction that they might consider punishment would have had, and that the verdict cannot stand.

Particularly is this true where the punishment in fact imposed was far from lenient—three years imprisonment.

Reasons for Granting the Writ

This Court has never passed on the question presented here, insofar as the researches of counsel for the appellant and counsel for the government were able to disclose. The single pronouncement of a Court of Appeals on this subject is contained in *Thlinket Packing Co.* v. *United States,* 236 Fed. 109 (9th Cir., 1916), where the Court affirmed a conviction accompanied by a recommendation of mercy, but there too the colloquy made it plain that the jury thought the statute too harsh and that "... while the defendant had violated the letter of the law it had not violated the spirit of it." *Id.* 113. There is dicta in *Krull* v. *United States,* 240 F. 2d 122, 134, (5th Cir., 1957), approving *Thlinket* but deciding the case on wholly different issues and grounds.

In *United States* v. *Mankowski,* 179 F. Supp. 667 (D.C. E. D. Wisconsin, 1960), the District Court denied the defendant's motion for a new trial based on the jury's recommendation for leniency. However, the Court in its opinion was careful to point out that after this recommendation the jury had been told that sentence would be based on the probation reports and then had the jury repolled.

The basis upon which such a line of reasoning may be said to rest is that since the jury is not authorized to make such a recommendation, the recommendation is "mere surplusage." See *Mankowski, supra,* at 668. Such reasoning, if indeed the phrase "mere surplusage" may be said to contain reasoning rather than stating a conclusion, does

not, we submit, comport with the current standards of fairness and reality in the conduct of Federal criminal cases.

The Courts have recognized the evident and very great danger that the possibility of leniency may lead a jury or members of a jury to vote guilty in the face of a reasonable doubt about the defendant's guilt and palliate their consciences by recommending mercy. Thus in *United States* v. *Louie Jim Hal,* 245 F. 2d 338 (2nd Cir. 1957), in writing on behalf of a unanimous court for reversal where the trial court had indicated its willingness to follow a recommendation for leniency, Judge Medina said, at 341:

> "We cannot say that, under these circumstances, no juror holding out for acquittal was led to abandon his position by the judge's assurance that a recommendation for leniency would be acted upon. More than likely, one or more jurors entertaining doubt as to appellants' guilt agreed to vote for conviction because they had it in their power to soothe their consciences by causing little or no punishment to be imposed. The courts have repeatedly held that where such a compromise has been encouraged by remarks by the trial judge indicating the probability of light punishment, a verdict of guilty cannot stand. E.g., Demetree v. United States, 5 Cir., 207 F. 2d 892; Lovely v. United States, 4 Cir., 169 F. 2d 386; Miller v. United States, 37 App. D.C. 138; Bethel v. State, 162 Ark. 76, 257 S.W. 740, 31 A.L.R. 402; Bryant v. State, 205 Ind. 372, 186 N.E. 322; State v. Kernan, 154 Iowa 672, 135 N.W. 362, 40 L.R.A., N.S., 239; People v. Warner, 289 Mich. 516, 286 N.W. 811; Territory v. Griego, 8 N.M. 133, 42 P. 81; People v. Sherwood, 271 N.Y. 427, 3 N.E. 2d 581; State v. Rowell, 224 N.C. 768, 32 S.E. 2d 356; State v. Shea, 226 S.C.

501, 85 S.E. 2d 858; State v. Kiefer, 16 S.D. 180, 91 N.W. 1117; McBean v. State, 83 Wis. 206, 53 N.W. 497."

If it would have been wrong for a judge to have told the jury that it could do something is it not doubly wrong for the jury to have done something which the judge specifically told them they should not do?

Whatever may have been the case in times past, it is clear that the current standard of Federal jurisprudence requires a realistic assessment of the effectiveness of jury instructions. *Jackson* v. *Denno,* 378 U.S. 368 (1964), was the death knell of ritualistic formalism in regard to what a jury could or would do, and turned upon an assessment of the realistic possibilities of jury deliberation. Indeed in *United States* v. *Bozza,* 365 F. 2d 206 (2nd Cir., 1966), in determining whether the limiting instructions restricting a co-defendant's confession were adequate to protect the rights of the defendants, the Court noted a jury request:

> "* * * Finally, the jury's request for Jones' confession, which they would hardly have needed if their interest were solely in its bearing on Jones' guilt, creates a real doubt, not present in *Delli Paioli,* that at least some of them, 'failed to follow the court's instructions.' 352 U.S. at 242, 77 S.Ct. at 300. We therefore cannot regard *Delli Paioli* as controlling in the Government's favor." *Id.* 216-217. (Footnote omitted.)

The Court of Appeals went on to conclude that in the circumstances of the case its credulity would be overstrained if it found the limiting instructions effective. Of course in *Bozza* the Court made inferences from what ques-

tions the jury asked during its deliberations, and from all the circumstances in the case that the jury could not and did not follow the instructions which it had been given.

In the case at bar, however, no such speculation was required. The jury's own words tell us that it violated the Court's instructions. The Court told the jury that they were not to permit the question of punishment to enter into their deliberation, and yet they reported as part of their verdict a recommendation of leniency. The plain and obvious inference is that the jury had considered the question of punishment and that the dangers of which Judge Medina spoke in *Louie Jim Hal, supra,* very likely materialized, and that some jurors, troubled about the sparsity of the Government's case which rested on a single eye-witness identification by a man who had not seen the defendant for over four years, had their doubts overcome not by reason, but by the palliative effect on their consciences of entering a recommendation of leniency.

The District Court here imposed a sentence of three years, for reasons which undoubtedly seemed to it to be sufficient. It was not the province of the jury to consider punishment for they did not and could not know the factors which would influence the Court in its determination of sentence. When that jury undertook in its deliberations to consider the question of punishment it so infected their consideration of the question of guilt or innocence that their verdict should not be permitted to stand.

We recognize that the disposition by the Court of Appeals for the Second Circuit of this case by affirming the conviction herein without opinion does not on the face of it commend the case to this Court for further review. How-

ever, we respectfully submit that on closer inspection this case raises the kind of question about fundamental fairness in the administration of Federal criminal justice which fully warrants the exercise of this Court's supervisory powers. It is and has been the firm policy in Federal criminal cases to segregate the determination of guilt or innocence and the imposition of sentence, and to allocate the former to the jury and the latter to the District Court judges. So long as that policy is in effect, it is a raw injustice to permit the jury to tincture its consideration of guilt and innocence with the palliative of a recommendation of leniency, and then permit the Court to impose a drastic term of imprisonment on the ground that the jury's recommendation was surplusage. This Court has not in the past hesitated to intervene where a sentence has been imposed in the face of the requirements of basic fairness. *Yates* v. *United States,* 356 U.S. 363 (1958). We are not, of course, urging that this Court may reduce sentence. *Gore* v. *United States,* 357 U.S. 386, 393, but rather saying that because of this very impotence on the part of appellate courts to modify the sentence of a district court, the infection of the jury's verdict with considerations of leniency which the court may disregard with impunity, makes it improper that juries' verdicts so contaminated should stand.

It is one of those nice legalisms which make the ordinary citizen scoff at the learned calling of the law to say, as the Court of Appeals implicitly did here, that if the District Court instructed or actively permitted the jury to consider punishment the verdict would have to fall, but that when the jury in insubordinate defiance of the Court's explicit instructions improperly considers the question of punishment the verdict must stand.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT KASANOF
Attorney for Petitioner Pollock

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JAMES CHARLES POLLOCK, a/k/a "Al Martin",
a/k/a "William Anderson",

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 300

JAMES CHARLES POLLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of New York of fraudulent use of wire communications, in violation of 18 U.S.C. 1343. He was sentenced to three years' imprisonment. The court of appeals affirmed from the bench (Pet. App. A.).

The government's evidence revealed that on September 11, 1962, a man calling himself Al Martin made five calls from Washington, D.C. to a Mrs. Le-

Boutillier in New York demanding $700. He stated that the money was owed to him by her son, Timothy, who was being held until payment was made. She was directed to wire payment by money order, imprinted with an identifying number, to a William Anderson, payable on sight (G.A. 2a-3a).[1] His directions were followed and the money order was received at Western Union by a man whom a Western Union employee identified at the trial as petitioner (G.A. 4a, 7a, 8a, 9a). The number imprinted on the money order was identified as petitioner's Marine Corps identification number (G.A. 11a-12a). The defendant neither took the stand nor offered evidence in his behalf. The court instructed the jury that the matter of sentence was not to enter into its deliberations (G.A. 15a; P.A. 19). Nevertheless, the jury returned a recommendation of leniency with its verdict of guilty (P.A. 25). Petitioner immediately requested a polling of the jury; all jurors adhered to the verdict. Petitioner's motion for mistrial was denied.

Petitioner's claim that the jury's recommendation of leniency invalidated its verdict is unsound. While, in the absence of statute, a recommendation of mercy by a jury is surplusage, the verdict rendered is not thereby vitiated. See, *e.g.*, *Krull* v. *United States*, 240 F. 2d 122, 133-134 (C.A. 5), certiorari denied, 353 U.S. 915; *Thlinket Packing Co.* v. *United States*, 236 Fed. 109, 113 (C.A. 9); *United States* v. *Mankowski*,

[1] "G.A." refers to the government's appendix in the court of appeals. "P.A." refers to the petitioner's appendix in the court of appeals.

179 F. Supp. 667 (E.D. Wisc.). The case upon which petitioner relies, *United States* v. *Louie Gim Hall*, 245 F. 2d 338 (C.A. 2), is distinguishable. There, the recommendation of leniency was presented only after lengthy deliberation, during which time the judge offered to consider any such recommendation in an apparent attempt to facilitate the reaching of a verdict. Here, in sharp contrast, the court specifically instructed the jury not to consider the matter of punishment at all. There is no showing, other than unfounded speculation, that the recommendation of leniency resulted from a compromise verdict. Immediately after their verdict, the jurors were polled and all adhered to the verdict of guilty.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JULY 1967.

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